80-1486

Office-Supreme Court, U.S.
FILED
FEB 28 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court Of The United States

No. ___

OCTOBER, 1980 TERM

Omni Farms, Inc. ..... *Appellant*

V.

Arkansas Power & Light Company ..... *Appellee*

ON APPEAL FROM THE
SUPREME COURT OF ARKANSAS

JURISDICTIONAL STATEMENT

JOHN B. THURMAN
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Attorneys for Appellant
Omni Farms, Inc.

QUESTIONS PRESENTED ON APPEAL

I.

WHETHER THE APPELLEE IN GOOD FAITH NEGOTIATED AS REQUIRED BY THE ARKANSAS EMINENT DOMAIN STATUTE.

II.

WHETHER THE APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BY APPELLEE'S FAILURE TO GIVE PERSONAL NOTICE OF THE ADMINISTRATIVE HEARING ON THE MAJOR UTILITY ROUTE AFFECTING ITS REAL PROPERTY, AS ALLOWED BY ARKANSAS STATUTE.

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OFFICIAL AND UNOFFICIAL REPORTS CITATION

Omni Farms, Inc. v. Arkansas Power & Light Co., 271 Ark. 61, 607 S.W.2d 363 (1980)

IN THE

Supreme Court Of The United States

No. ____

OCTOBER, 1980 TERM

Omni Farms, Inc. ..... *Appellant*

V.

Arkansas Power & Light Company ..... *Appellee*

ON APPEAL FROM THE
SUPREME COURT OF ARKANSAS

JURISDICTIONAL STATEMENT

GROUNDS FOR JURISDICTION

This is an appeal from the Arkansas Supreme Court's decision affirming the Circuit Court's Order of Entry and allowing Appellant's land to be condemned. The Supreme Court of Arkansas delivered its opinion on November 10, 1980. A Petition For Rehearing was timely filed by Appellants but the Petition was denied by Per Curiam Order on December 8, 1980. The Notice Of Appeal To The Supreme Court of the United States was filed with the Supreme Court of Arkansas on December 31, 1980.

This appeal is taken pursuant to 28 U.S.C. §1257(2). This Court has found in several cases that a federal question is involved where the taking of property without due

process of law, in violation of the Fourteenth Amendment, is presented. *Myles Salt Co. v. Board of Commissioners*, 239 U.S. 478, 60 L.Ed. 392, 36. S.Ct. 204 (1916); *Henderson Light & Power Co. v. Blue Ridge I.R. Co.*, 243 U.S. 563, 61 L.Ed. 900, 37 S.Ct. 440 (1917). In the alternative, should this Court find the appeal improvidently taken, Appellant relies upon 28 U.S.C. §2103.

CONSTITUTIONAL PROVISIONS AND STATUTES

I.

U.S. Const. Amend. XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II.

Utility Facility Environmental and Economic Protection Act, Ark. Stat. Ann. §73-276 – 73-276.18 (1977)

(Text found in Appendix at page 28.)

STATEMENT OF THE CASE

Appellee is an Arkansas corporation whose principal business activity is the production and sale of electrical power. Appellant is an Arkansas Corporation and the owner of certain real property located in Lonoke County, Arkansas. Appellee has sought to condemn this property by exercising the power of eminent domain authorized by Ark. Stat. Ann. §73-276 *et. seq.*

Certain Administrative hearings were held before the Arkansas Public Service Commission as required by Ark. Stat. Ann. §73-276 *et. seq.* Notice of the final hearing was given by publication, as required by the Statute. By Order of the Public Service Commission, Notice of the final hearing was given in a letter sent by ordinary mail.

Appellee filed a condemnation suit in Lonoke County Circuit Court on March 10, 1980 in which it asked the Court for an Order of Entry onto Appellant's Lonoke County real property and for the condemnation of said property. By agreement of counsel, a hearing was set for April 7, 1980.

In its Answer, Appellant asserted that the condemnation action filed by Appellee was unconstitutional under the due process clauses contained in the United States and Arkansas Constitutions. Appellant further contended that Appellee had made no effort to negotiate a settlement with Appellant as required by Ark. Stat. Ann. §73-276.15.

On April 7, 1980, the Court held a hearing to consider Appellant's arguments raised by way of Answer. Testimony was taken, exhibits were offered, and arguments were presented.

On May 2, 1980 the Circuit Court entered its Order of Entry, overruling Appellant's contentions, and authorizing Appellee to condemn Appellant's property.

Appellant appealed the decision of the Circuit Court of Lonoke County to the Supreme Court of Arkansas by giving notice on April 28, 1980. In its Brief to the Supreme Court of Arkansas, Appellant again raised the issue of denial of due process rights under the U.S. Constitution as well as the issue of Appellee's failure to negotiate as required by Ark. Stat. Ann. §73-276.15.

The Arkansas Supreme Court delivered its opinion on November 10, 1980. The Court found that under Ark. Stat. Ann. §73-276.15 negotiation with the landowner is mandatory prior to bringing a condemnation action; however, the Court further found that preliminary negotiations are not jurisdictional. On the constitutional issue, the Court found that Appellant had not suffered a denial of due process despite its lack of notice of the impending condemnation.

Appellant filed a Petition For Rehearing with the Supreme Court of Arkansas on November 21, 1980. By Per Curiam Order dated December 8, 1980, the Petition for rehearing was denied.

STATEMENT OF SUBSTANTIAL QUESTIONS

The due process question presented in this appeal deals with the issues of notice and opportunity to be heard in the context of an eminent domain case. The Fourteenth Amendment to the federal Constitution prohibits the deprivation of property without due process of law.

Numerous cases have stated that due process requires that no one be deprived of their property or rights without being given an opportunity to be heard. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). Due process further requires that a meaningful opportunity to be heard, preceded by notice, be given before one may be deprived of a significant property interest. *Boddie v. Connecticut*, supra. In the case at hand, no serious contention can be made that ownership of real property is not a significant property interest.

While there are situations where some valid, overriding state interest may justify postponement of a hearing until after the event, condemnation of real estate does not fit into that category. There is no risk of the property being removed or destroyed as might happen with movable personal property. Further, once the land is entered onto, cleared, and huge metal transmission towers put in place, the landowner can never be placed in the same position again.

Under the Arkansas statutory scheme, as found in Ark. Stat. Ann. §73-276 *et. seq.*, the Arkansas Public Service Commission is given the exclusive and final jurisdiction to determine the location and route for a major utility line. The P.S.C. is given exclusive authority to grant a "certificate of environmental compatability and public need" following the submission of an application by the utility and a hearing. While a copy of the application and notice of the hearing must be given to certain public bodies and public officials, the public and affected landowners are "served" by publication in newspapers of general circulation. Ark. Stat. Ann. §73-276.4(c).

After the Certificate is issued to the Utility, negotiation for the sale of land must be initiated with the landowner. If a settlement is not reached, the utility simply files a Condemnation action in the county in which the land is located. The Utility is required to deposit with the Court a sum of money determined by the Court to be sufficient to secure compensation. The issues of location of the line and necessity are not considered by the Court. The Arkansas legislature has given the P.S.C. the exclusive jurisdiction to determine these issues.

What results from this scheme is that the landowner is precluded from participating in the determination of where a utility line will be located unless they intervene in the P.S.C. case. The statutory plan outlined above requires notice by publication only.

This case is then very similar to *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). There, a New York Statute allowed for a common trust fund for small trusts. The only notice required, by the law, of the accounting to the Court was by newspaper publication, after which the account was made binding and conclusive on all beneficiaries.

The Supreme Court stated that "the fundamental requisite of due process of law is the opportunity to be heard." 339 U.S. 306, 313-14. The Court further stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections (citations omitted, 339 U.S. 306, 314-315).

The Court held that publication is sufficient only for those whose addresses were unknown; statutory notice deprived those whose names and addresses were known to the bank of due process of law.

Based upon this reasoning, Appellant submits that there are substantial questions of law which require plenary consideration by this Court.

Respectfully submitted,

THURMAN & CAPPS, LTD.

BY: _____

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2504 McCain Blvd.
Suite 201
No. Little Rock, AR 72116
(501) 758-1254

Attorneys for Appellant
Omni Farms, Inc.

CERTIFICATE OF SERVICE

I, John B. Thurman, Attorney of Record in this Appeal, do hereby certify that the appropriate number of copies of Appellant's Omni Farms, Inc., Jurisdictional Statement have been delivered to the undersigned parties by placing them in the U.S. Mail, properly addressed, and with first-class postage pre-paid. Since 28 U.S.C. §2403(b) may be applicable, the Jurisdictional statement has been served on the Arkansas Attorney General in the same manner.

JOHN B. THURMAN
Attorney For
Omni Farms, Inc.

Robert Robinson
Attorney for Arkansas
Power & Light
1550 Tower Bldg.
L.R., AR 72201

The Honorable Steven Clark
Arkansas Attorney General
Justice Building
Little Rock, AR 72201

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
October, 1980 Term

OMNI FARMS, INC. APPELLANT

VS.

ARKANSAS POWER & LIGHT APPELLEE

ENTRY OF APPEARANCE

I, John. B. Thurman, of Thurman & Capps, Ltd. law-firm, hereby enter my appearance as counsel of record for the Appellant, Omni Farms, Inc.

Respectfully submitted,

THURMAN & CAPPS, LTD.

BY: _____
JOHN B. THURMAN

APPENDIX

SUPREME COURT OF ARKANSAS

No. 80-137

OMNI FARMS, INC., Appellant, V. ARKANSAS POWER & LIGHT COMPANY, Appellee.

Opinion Delivered Nov. 10, 1980.

Appeal from Lonoke Circuit Court; Cecil Tedder, Judge.

Affirmed.

GEORGE ROSE SMITH, *Associate Justice*

GEORGE ROSE SMITH, J. In August, 1978, the Public Service Commission authorized the appellee, Arkansas Power & Light Company, to construct a generating plant in Independence county and about 170 miles of connecting high-voltage transmission lines to points in Pulaski and Lonoke counties. Pursuant to that authorization A.P. & L. brought this condemnation suit 18 months later to acquire a 180-foot right of way across a cattle ranch owned by the appellant, Omni Farms, Inc., in Lonoke County. In its answer Omni asked that the action be dismissed because, first, A.P. & L. had allegedly made no effort to negotiate a settlement with Omni before filing suit, and second, "the laws relied upon by Plaintiff are unconstitutional on due process grounds."

After a preliminary hearing the trial court rejected both defenses, approved the condemnation, and ordered a $15,000 deposit as the estimated value of the 17.14 acres being

taken. The court, however, to avoid a possibility of irreparable injury to Omni, stayed the judgment pending this appeal. The case has not yet been tried on the main issue of the amount of compensation to be awarded. Our jurisdiction rests on Rule 29 (1) (c).

At the outset, A.P. & L. asks that the appeal be dismissed for want of an appealable order. The record indicates that the proposed transmission lines will be strung on tall metal towers, embedded in concrete. At the oral argument counsel for A.P. & L. conceded that if the construction is allowed to proceed, it will be impossible in the event of a reversal for Omni's land to be restored to its previous condition. We conclude that this is one of the comparatively rare instances, foreseen by some of our earlier opinions, in which an order must be regarded as appealable because otherwise the order would divest a substantial right in such a way as to put it beyond the power of the court to place the party in its former condition. See *Johnson v. Johnson*, 243 Ark. 656, 421 S.W.2d 605 (1967); *Batesville v. Ball*, 100 Ark. 496, 140 S.W. 712, Ann. Cas. 1913C, 1317 (1911).

On the merits, Omni first argues that the controlling statute mandatorily requires the condemnor to negotiate with regard to the purchase price before bringing suit to condemn and that a failure to negotiate is a jurisdictional defect so fundamental as to require dismissal of the action.

We do not agree. Unquestionably the legislature is free to require preliminary negotiation as a condition precedent to the exercise of the power of eminent domain. Courts elsewhere have frequently construed as mandatory various statutes contemplating such preliminary negotiations and have sometimes indicated that a

condemnation order entered without prior negotiation is absolutely void for want of jurisdiction. The cases have been extensively collected in Nichols' Eminent Domain, §24.62 (rev. 3d ed., 1976), and need not be reviewed here.

The language of the particular statute, however, must be considered. Our General Assembly has said, for example, that in certain condemnation actions brought by state colleges the board of trustees must first "exercise every reasonable effort to obtain the property in question at a reasonable price by negotiation, and the Trial Court shall so find." Ark. Stat. Ann. §80-3318 (Repl. 1980). If language such as that were now before us, Omni's argument would have greater force.

The statute controlling this case is vastly different from that just quoted. It provides that whenever a utility company has obtained from the Public Service Commission the required certificate of environmental compatibility and public need, and the utility "is unable to reach agreement with the owner of land . . . to construct, operate, maintain and obtain reasonable access to the major utility facility, it may acquire the same by the exercise of the power of eminent domain." Ark. Stat. Ann. §73-276.15 (Repl. 1979). It was evidently the intention of the legislature to require preliminary negotiation, which has often proved to be immensely beneficial to both parties when a condemnation suit is being considered. We accordingly hold, in harmony with the great weight of authority, that the statute now in question imposes a mandatory duty on the utility company to negotiate.

It does not follow, however, that the duty is necessarily of such indispensable importance as to be jurisdictional. By analogy, many steps required by the

election laws are mandatory, but noncompliance does not destroy the validity of the election unless the statute expressly so declares or unless the particular provision affects an essential element of the election, as by obstructing the free and intelligent casting of the vote. *Orr v. Carpenter*, 222 Ark. 716, 262 S.W.2d 280 (1953).

The statute now in question does not expressly declare preliminary negotiations to be jurisdictional, nor in our opinion does it do so by implication. The opportunity to negotiate does not end with the filing of the suit, especially as several months may pass before the case is set for trial. Moreover, if negotiation were a jurisdictional requirement, it would follow that a condemnation judgment entered after a long and hotly contested trial would be void if it were later shown that the condemnor failed to negotiate. The wording of the statute would have to be decidedly more imperative than it is before we could regard negotiation as jurisdictional.

The trial court's finding that A.P. & L.'s negotiation procedure met the requirements of the law is not clearly erroneous. A.P. & L.'s appraiser testified that the value of the 17.14 acres being taken for a right of way was $875 an acre, making a total of about $15,000. Another witness for A.P. & L. testified that he had authorized settlement offers through the company's attorneys; the trial court took notice that the negotiations had not been successful. William Fay Wright, Omni's president, testified on cross examination that on the morning of the hearing Omni's attorney had informed Wright of an offer of $15,000. "When I heard $15,000, it was so ridiculous he [the attorney] wouldn't bring anything like that to me. It would only tend to upset me." He said the offer would not be accepted under any circumstances. Negotiations need not be carried farther

than to demonstrate the impossibility of agreement, which may be shown by the landowner's willingness to sell only at a price which the condemnor deems excessive. *Kerr v. Raney*, 305 F. Supp. 1152 (W.D. Ark. 1969); see also Nichols, *supra*. That appears to have been the situation in the case at bar; so no error is shown.

Omni's alternative ground for dismissal is its assertion that the governing statute denies due process of law. The statute is Act 164 of 1973, amended by Act 866 of 1977. Ark. Stat. Ann. §§73-276.1 through -276.18. Omni's argument is really directed not so much to the terms of the statute as to Omni's failure to receive sufficient notice of the Public Service Commission proceeding by which A.P. & L. was authorized to cross Omni's land. Consequently we need discuss the statute and the proof only as they relate to the matter of notice. Upon this branch of the case it must be kept in mind that Omni is attacking the procedure as a denial of due process and therefore has the burden of proving its invalidity. *Rebsamen Motor Company v. Phillips*, 226 Ark. 146, 289 S.W.2d 170, 57 A.L.R. 2d 1256 (1956); *State ex rel. Kimberlite Diamond Mining & Washing Co. v. Hodges*, 114 Ark. 155, 169 S.W. 942, L.R.A. 1916F, 122 (1914).

The statute requires the Commission to make various findings as to the probable environmental impact of the proposed facility. §73-176.8. With respect to such matters of general public interest the statute provides for actual notice to specified governmental agencies and for notice by publication to persons residing in affected municipalities and counties. §73-276.4. Omni does not appear to be concerned about these environmental matters, but even if it were concerned it has not met its burden of proving any want of notice in this aspect of the case.

What Omni does seem to be concerned about, as nearly as we can tell from its meager proof, is the particular location of the right of way that will cross its land. On this point Wright mentioned an airport that Omni has built on its land, but he did not say just how the proposed line might interfere with the airport (except possibly by a reference to a plastic overlay which has not been brought to our attention). In fact, the construction of the airport, which took only about two months, was not even begun until some three months after A.P. & L. had notified Omni in September, 1979, that in the very near future surveyors would be on the land to make a final location of the transmission line route on the ground.

As we understand Omni's argument, it is contended that Omni did not receive adequate notice about just where the transmission line was going to cross its property. Omni concedes that it is not entitled to procedural due process concerning the necessity for the taking *unless* the legislature has provided a forum in which the landowner may contest that necessity. *Bragg v. Weaver*, 251 U.S. 57 (1919). Omni argues that the legislature did designate the Public Service Commission as such a forum, but Omni did not receive adequate notice of the proceedings to be conducted by the Commission. Specifically, Omni insists that although it received letters from A.P. & L. informing it of the pendency of the proceedings, those letters stated that Omni would be notified of the time and place of a hearing to be scheduled by the Commission in connection with A.P. & L.'s application as soon as the Commission advised A.P. & L. of the schedule. That follow-up information was not received by Omni.

We do not find this argument persuasive. The Commission's primary concern was with environmental

matters, which were presumably to be considered at the hearing to which the letters referred. Omni has made no effort to show that the hearing mentioned in the letters would have touched upon any issue with which Omni was concerned.

Of course, the Commission had to fix the approximate location of the transmission lines to assess their environmental impact. That was eventually done, and the letters sent by A.P. & L. to Omni enclosed aerial photographs of Omni's land, showing the proposed location of the lines. Even when the Commission finally fixed the location of the lines in its order granting the application, the order expressly allowed some variation, up to 300 feet and possibly more, in the exact location of the right of way to accommodate the landowner.

We emphasize the fact that the two letters, one received by Omni in February, 1978, and the other in January, 1979, contained much substantial information in addition to the aerial photographs. Omni was informed of the nature of the proceeding before the Public Service Commission. Omni was told that information about its right to intervene in the proceeding could be obtained from the Secretary of the Commission, whose name, address, and telephone number were given. The writer of the letters offered to discuss any questions about the proposed facility with Omni, giving his name and address, with a long distance telephone number that Omni could use free of charge.

Neighbors of Omni did call A.P. & L. in response to similar letters. The Commission's final order details modifications in line locations made in response to interventions by other landowners. The letters were

certainly sufficient to put a reasonably prudent person on inquiry, which means that Omni is charged with notice of all facts such an inquiry would have revealed. *Kellogg-Fontaine Lbr. Co. v. Cronic*, 219 Ark. 170, 240 S.W.2d 842 (1951). Unquestionably Wright must be taken to have known that the Commission would not hold a hearing upon Omni's particular problems with respect to its particular land unless Omni took the initiative in bringing those problems to the Commission's attention. But no move in that direction was made. Omni did file a petition for rehearing with the Commission, but it is not shown what it contained nor whether Omni might have had a remedy by appealing from the denial of the petition.

Omni's due process argument boils down to this. It complains that A.P. & L. failed to give it the promised notice of a Commission hearing, the nature of which Omni has not shown. Omni did receive actual notice, once in February, 1978, and again in January, 1979, that the line was to cross its ranch. Details and sources of information were supplied, but Omni and Wright apparently paid little if any attention to the matter until receiving notice that A.P. & L.'s surveyors would be on the ground soon after September, 1979, more than 18 months after the February letter. We still do not know exactly what Omni's objections to the proposed line may be, because the record is practically silent on that pivotal point. We cannot say that Omni has proved a denial of due process of law by any lack of notice of the impending condemnation.

Affirmed.

Fogleman, C.J., and Hickman, J., concur.

IN THE CIRCUIT COURT
OF LONOKE COUNTY, ARKANSAS
ORDER FILED MAY 2, 1980

ARKANSAS POWER & LIGHT COMPANY PLAINTIFF

VS. NO. 80-103

OMNI FARMS, INC. DEFENDANT

ORDER

On this 7th day of April, 1980, is presented to the Court the Complaint of Arkansas Power & Light Company for condemnation and for an easement for transmission lines as part of a major utility facility for the construction facilities designated for operation at a capacity of 50 megawatts or more on the property of the Defendant described in the Complaint. Arkansas Power & Light Company appearing by its attorneys, the Honorable James F. Swindoll and the Honorable Robert L. Robinson and the Defendant, appearing by its attorneys, the Honorable John Thurman and the Honorable Rita Gruber, and the Court convening in White County, Arkansas and after reviewing the sworn testimony, the exhibits thereto, the pleadings filed herein, and the applicable law, the Court made the following findings of fact and conclusion of law:

1. That the parties have voluntary waived venue in this case so that the matter might be heard in the Circuit Court of White County, Arkansas.

2. That the applicable laws, statutes and regulations which establish the guidelines and procedures by which the Plaintiff, as a private utility company, may

acquire private property by eminent domain action, establish the necessity therefor, and prescribe the procedures for such action, are deemed by this Court to be constitutional and not in deprivation of the due process rights of the Defendant.

3. That the procedure followed by Plaintiff in its negotiations with Defendant, the filing of pleadings, and the deposit of funds, adequately followed the requirements of the law.

4. That although the Court believes that Defendant's challenge of the sufficiency of the notice of the filing of the application and notice of the subsequent hearing thereon before the Public Service Commission should be presented to the Public Service Commission as prescribed by Title 73 of the Arkansas Statutes, this Court, nevertheless, finds that Plaintiff sufficiently complied with the requirements of the law with regard to notice in all respects.

5. That this Court treats the Defendant's request for denial of an immediate Order of Entry in favor of Plaintiff as being tantamount to a prayer for injunctive relief, which this Court hereby denies.

6. Based upon the proof submitted to the Court, the Court finds that Plaintiff should be required to deposit $15,000 with the Circuit Clerk of Lonoke County, Arkansas, as a prerequisite to obtaining the Order for Entry.

7. The Court further finds that this Order is an appealable Order in that (a) it is determinative of the constitutional questions raised by the Defendant; (b) it effectively denies injunctive relief sought by Defendant;

and, (c) delay in an appeal until such time as the proposed utility line is in place and a trial is had on the merits of the case could result in irreparable damage to the Defendant.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that the Plaintiff, Arkansas Power & Light Company, be and it is hereby authorized to condemn said lands of the Defendant in Lonoke County, Arkansas, for the purpose of locating, clearing and constructing said transmission facilities on an easement described as follows:

> A right-of-way 180 feet wide across the East Half Northeast Quarter (E-½, NE-¼) of Section 35, and the Southeast Quarter, Southeast Quarter (SE-¼, SE-¼) of section 26, and the Southwest Quarter, Southwest Quarter (SW-¼, SW-¼) of Section 25 all in Township 5 North, Range 10 West, Lonoke County, Arkansas, said right-of-way extending 90 feet on each side of the center line of the proposed transmission line as now staked, for an approximate distance of 4,210 feet.

The Plaintiff, Arkansas Power & Light Company, is directed to deposit with the Clerk of this Court, cash in the sum of $15,000 for the protection of the Defendant, which will guarantee the Defendant that the Plaintiff will satisfy any judgment which may be entered against it at a trial of this cause, and the Clerk may deposit the said sum of cash in a suitable bank or savings and loan association where said money will draw interest at the highest rate now being paid by banks or savings and loan associations' regular accounts within the State of Arkansas, that said sum of money to remain in said bank or savings and loan association subject to further orders of this Court.

IT IS, THEREFORE, ORDERED that this cause be tried before a jury for the assessment of just compensation as soon as can be reached on the calendar.

/s/ Cecil C. Tedder
CIRCUIT JUDGE

May 1, 1980
DATE

APPROVED:

HOUSE, HOLMES & JEWELL
1550 Tower Building
Little Rock, Arkansas 72201

BY: /s/ James F. Swindoll
James F. Swindoll

Attorneys for Arkansas Power & Light Company

APPROVED:

THURMAN & CAPPS

BY: _____
John Thurman

Attorney for Omni Farms, Inc.

IN THE SUPREME COURT
OF THE STATE OF ARKANSAS
Notice Filed 12-31-80

OMNI FARMS, INC. Appellant

VS. Lonoke No. 80-137

ARKANAS POWER & LIGHT COMPANY Appellee

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

I.

Notice is hereby given that Omni Farms, Inc., the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Arkansas affirming the Order of Entry entered in this action on May 1, 1980, by the Circuit Court of Lonoke County, Arkansas.

II.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (1).

III.

That Appellant's Petition For Rehearing was denied by the Supreme Court of Arkansas on December 8, 1980.

/s/ John B. Thurman
THURMAN & CAPPS, LTD.
Attorney for Omni Farms, Inc.
#2504 McCain Place, Suite 201
North Little Rock, AR 72116
(501) 758-1254

Proof of Service

I, Rita W. Gruber, an Attorney in the office of Messrs. Thurman & Capps, Ltd., Attorneys of record for Omni Farms, Inc., Appellant herein, depose and say that on the 31 day of December, 1980, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Arkansas Power & Light Co., Appellee herein, by mailing a copy of same to Robert L. Robinson, Jr., of HOUSE, HOLMES & JEWELL, P.A., Attorneys for Appellee, by U.S. Mail, postage prepaid, 1550 Tower Building, Little Rock, Arkansas 72201.

I further certify that a copy of this Notice of Appeal was sent this same day to the Honorable Cecil Tedder, Circuit Judge, Wilbur D. Mills Courts Building, Searcy, Arkansas 72143.

/s/ Rita W. Gruber
RITA W. GRUBER

SUBSCRIBED and SWORN to before me, at North Little Rock, Arkansas this 31 day of December, 1980.

/s/ Melanie Poe
NOTARY PUBLIC

MY COMMISSION EXPIRES:

May 17, 1982

SUPREME COURT OF ARKANSAS

OMNI FARMS, INC. APPELLANT

VS. NO. 80-137

ARKANSAS POWER & LIGHT COMPANY APPELLEE

APPEAL FROM LONOKE CIRCUIT COURT
THE HONORABLE CECIL TEDDER, JUDGE

PETITION FOR REHEARING
Filed Nov. 21, 1980
Dona L. Williams, Clerk

Appellant, for its Petition for Rehearing, states:

1. That the Court erred in finding that the Public Service Commission was not the exclusive forum in which Appellant could contest necessity for the AP&L transmission line and the lines' ultimate location on Appellant's land.

2. That the Court erred in finding that Ark. Stat. Ann. Section 73-276.15 (repl. 1979), while imposing a mandatory duty on a utility company to negotiate, does not make negotiation a jurisdictional prerequisite as well.

3. That Appellee's failure to give actual notice of the Public Service Commission hearing and Appellee's further failure to negotiate, require that this case be dismissed.

The power given to the Public Service Commission in Ark. Stat. Ann. Section 73-276 through 276.18 includes but is not limited to protecting the environment and economic protection. The certificate of the Commission for the location of a major utility facility is issued only after the Commission finds and determines that there is a need and the facility will serve the public interest, convenience, and necessity. Section 73-276.8. Furthermore, no other Court of this state has jurisdiction to hear the issues of location of the line or necessity. Section 73-276.11. Therefore, one must participate in the Public Service Commission proceeding in order to be heard at all. In the case at hand, a very valuable property right will be divested because the property owner was never given actual notice as required by Section 73-276.4 and by accepted concepts of due process, *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950).

The Court has found at page 4 of its opinion that Ark. Stat. Ann. Section 73-276.15 imposes a mandatory duty on any utility company to negotiate. Using the reverse argument of that used by the Court, a Court could find that a utility did not negotiate as required by statute and the landowner would essentially be without a remedy. In addition, the utility would know this and only make unilateral offers and then file a condemnation action, as found here. In fact, the Public Service Commission order in this case requires the Appellee to negotiate with the landowner and move the line as situations require, but Appellee flatly states that it will not move "one inch" from the route as presently laid out.

That based on these points and arguments Appellant respectfully prays that this Court rehear this case and reverse its former decision.

Respectfully Submitted,

THURMAN & CAPPS, LTD.
#2504 McCain Place, Suite 201
North Little Rock, Arkansas 72116
(501) 758-1254

Attorneys for Appellant

CERTIFICATE OF COUNSEL

I, Rita W. Gruber, of Thurman & Capps, Ltd., attorney for Appellant, believe that there is merit in this petition and it is not filed for the purpose of delay.

THURMAN & CAPPS, LTD.

BY: /s/ Rita W. Gruber
RITA W. GRUBER

I certify that a copy of the foregoing was furnished opposing counsel of record by mailing same to the usual business address of said counsel on 11-20, 1980.

/s/ Rita W. Gruber

TO: ROBERT ROBINSON
Attorney at Law
1550 Tower Building
Little Rock, Arkansas 72201

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS
LITTLE ROCK

DECEMBER 8, 1980

Rita W. Gruber
Attorney at Law
2504 McCain Place, Suite 201
North Little Rock, AR 72216

Re: 80-137 Omni Farms, Inc. v. Arkansas Power & Light Company

Dear Ms. Gruber:

The Court made the following order in the above styled case today:

"Petition for Rehearing denied."

Sincerely yours,

/s/ Dona L. Williams
Dona L. Williams
Clerk

DLW:rh

cc: Robert Robinson
Attorney at Law
1550 Tower Building
Little Rock, AR 72201

73-276. Utility facility environmental protection — Short title. — This Act [§§ 73-276—73-276.18] shall be known, and may be cited as, the "Utility Facility Environmental and Economic Protection Act." [Acts 1973, No. 164, §1, p. 564; 1977, No. 866, § 1, p. 2160.]

73-276.1. Policy. — The Legislature hereby finds and declares that there is at present and will continue to be a growing need for electric and gas public utility services which will require the construction of major new facilities. It is recognized that such facilities cannot be built without in some way affecting the physical environment where such facilities are located and without the expenditure of massive amounts of capital. The Legislature further finds that it is essential in the public interest to minimize any adverse effect upon the environment and upon the quality of life of the people of the State which such new facilities might cause and to minimize the economic costs to the people of the State of obtaining reliable, clean, safe, and adequate energy supplies. The Legislature further finds that present laws and practices relating to the location, financing, construction, and operation of such utility facilities should be strengthened to protect environmental values, to encourage the development of alternative renewable and non-renewable energy technologies which are energy-efficient, and to take into account the total cost of society of such facilities. Present laws and practices may result in undue costly delays in new construction, may encourage the development of energy technologies which are relatively inefficient, and may increase costs, eventually borne by the people of the State in the form of higher utility rates. These existing laws and practices threaten the ability of utilities to meet the needs of the people of the State for economic [economical] and reliable utility service. Furthermore, the Legislature finds that there should be

provided an adequate opportunity for individuals, groups interested in energy and resource conservation and the protection of the environment, State and regional agencies, local governments, and other public bodies to participate in timely fashion in decisions regarding the location, financing, construction, and operation of major facilities. The Legislature, therefore, hereby declares that it shall be the purpose of this Act [§§73-276 – 73-276.18] to provide a forum with exclusive and final jurisdiction, except as provided in Section 19 [§ 73-276.18] of this Act, for the expeditious resolution of all matters concerning the location, financing, construction, and operation of electric generating plants and electric and gas transmission lines and associated facilities in a single proceeding to which access will be open to individuals, groups, State and regional agencies, local governments and other public bodies to enable them to participate in these decisions. These matters presently under the jurisdiction of multiple State, regional and local agencies, are hereby declared to be of State-wide interest. [Acts 1973, No. 164, § 2, p. 564; 1977, No. 866, § 2, p. ____.]

73-276.2. Definitions. — The following words, when used in this Act [§§ 73-276 – 73-276.18], shall have the following meanings, unless otherwise clearly apparent from the context:

(a) The word "Commission" shall mean the Public Service Commission of this State.

(b) The words "major utility facility" shall mean (1) electric generating plant and associated transportation and storage facilities for fuel and other facilities designed for, or capable of, operation at a capacity of fifty (50) megawatts or more; (2) for the sole purpose of requiring an environmental

impact statement hereunder, an electric transmission line and associated facilities, including substations, of a design voltage of one hundred (100) kilovolts or more, extending a distance of more than ten (10) miles, or of one hundred seventy (170) kilovolts or more, extending a distance of more than one (1) mile; and (3) for the sole purpose of requiring an environmental impact statement hereunder, a gas transmission line and associated facilities designed for, or capable of, transporting gas at pressures in excess of one hundred twenty-five (125) pounds per square inch, extending a distance of more than one (1) mile, excepting, however, those gas pipelines devoted solely to the gathering of gas from gas wells constructed within the limits of any gas field as defined by the Arkansas Oil and Gas Commission.

(c) The words "commence to construct" shall mean any clearing of land, excavation, or other action that would adversely affect the natural environment of the site or route of a major utility facility, but does not include changes needed for temporary use of sites or routes for non-utility purposes, or uses in securing survey or geological data, including necessary borings to ascertain foundation conditions.

(d) The word "municipality" shall mean any county or municipality within this State.

(e) The word "person" shall include any individual, group, firm, partnership, corporation, cooperative association(s), municipality, government subdivision, government agency, local government or other organization.

(f) The words "renewable energy technology" shall mean any technology or source of energy, such as solar, wind, biomass conversion, or geothermal, which is not depletable.

(g) The words "non-renewable energy technology" or "non-renewable energy sources" shall mean any technology or source of energy which depends upon the use of depletable fossil fuels such as oil, gas, and coal.

(h) The words "energy-efficient" shall mean economical in the use of energy.

(i) The words "public utility" or "utility" shall mean any person engaged in the production, storage, distribution, sale, delivery or furnishing of electricity or gas, or both, to or for the public, as defined in Sections 1(d) (1) and 1(d) (3) of Act 324 of 1935 [subsections (d) (1) and (d) (3) of § 73-201], as amended.

(j) The word "applicant" shall mean the utility or other person making application to the Commission for a certificate of environmental compatibility and public need. [Acts 1973, No. 164, § 3, p. 564; 1977, No. 866, § 3, p. 2160.]

73-276.3. Certificate of environmental compatibility and public need. — (a) No person shall hereafter commence to construct a major utility facility in the State, except those exempted as provided in Sections 4(d), 4(e) or 4(f) [subsections (d) through (f) of this section], without first having obtained a certificate of environmental compatibility and public need (hereafter in this Act [§§ 73-276 — 73-276.18] called a "certificate") issued with respect to such facility by the Commission. The replacement or expansion of an existing transmission facility with a similar facility, in

substantially the same location, or the rebuilding, upgrading, modernizing or reconstruction for the purposes of increasing capacity [shall not constitute construction of a major utility facility], provided, no increase in width of right-of-way is required. Any facility, with respect to which a certificate is required, shall thereafter be located, financed, constructed, operated, and maintained in conformity with such certificate and any terms, conditions and modification[s] contained therein. A certificate may only be issued pursuant to this Act.

(b) A certificate may be transferred subject to the approval of the Commission, to a person who agrees to comply with the terms, conditions and modifications contained therein, and shall be transferable by operation of law to any receiver, trustee or other similar assignee under a mortgage, deed of trust or similar instrument.

(c) Upon application by an applicant, a certificate issued hereunder may be amended as herein provided, or in accordance with such simplified procedures as the Commission may establish by reasonable rules and regulations.

(d) This Act shall not apply to any major utility facility:

(1) for which prior to the effective date [July 5, 1977] of this Act, an application for the approval of same has been made to any Federal, State, regional or local governmental agency, which possesses the jurisdiction to consider the matters prescribed for finding and determination in Subsection (a) of Section 9 [§ 73-276.8] of this Act; (2) for which, prior to the effective date of this Act, the Commission has issued a certificate of convenience and

necessity or otherwise approved the construction of same; or (3) over which an agency of the Federal Government has exclusive jurisdiction.

(e) Nothing in this Act shall be construed to require a certificate hereunder or an amendment thereof for reconstruction, alteration or relocation of any major utility facility which must be reconstructed, altered or relocated because of the requirements of any Federal, State, or county governmental body or agency for highway transportation purposes, public safety, or air and water quality.

(f) The Commission shall have, and is hereby granted, after reasonable notice and hearing, the power and authority to make, and amend from time to time, reasonable rules and regulations establishing exemptions from some or all of the requirements of this Act for the construction, reconstruction or expansion of any major utility facility which is unlikely to have major adverse environmental or economic impact by reason of length, size, location, available space or right-of-way on or adjacent to existing utility facilities and similar reasons.

(g) Any person intending to construct any utility facility excluded or exempted from this Act may elect to waive such exclusion or exemption by delivering notice of such waiver to the Commission. This Act [§§ 73-276 – 73-276.18] shall thereafter apply to each such major utility facility identified in such notice from the date of its receipt by the Commission. [Acts 1973, No. 164, § 4, p. 564; 1977, No. 866, § 4, p. 2160.]

73-276.4. Application for certificate. — (a) An applicant for a certificate shall file with the Commission a

verified application in such form as the Commission may prescribe and containing the following information: (1) a general description of the location and type of the major utility facility proposed to be built; (2) a general description of any reasonable alternate location or locations considered for the proposed facility; (3) a statement of the need and reasons for construction of the facility; (4) a statement of the estimated costs of the facility and the proposed method of financing the construction of the facility; (5) a general description of any reasonable alternate method(s) of financing the construction of the facility; (6) a description of the comparative merits and detriments of each alternate financing method considered. If, at the time of filing of the application, the federal income tax laws and the State laws would permit the issuance of tax-exempt bonds to finance the construction of the proposed facility for the applicant by a State financing agency, the application shall also include a discussion of the merits and detriments of financing the facility with such bonds: (7) an analysis of the projected economic or financial impact on the applicant and the local community where the facility is to be located as a result of the construction and the operation of the proposed facility; (8) an analysis of the estimated effects on energy costs to the consumer as a result of the construction and operation of the proposed facility; (9) an exhibit containing an Environmental Impact Statement, which shall fully develop the four [4] factors listed hereafter, treating in reasonable detail such considerations, if applicable, as the proposed facility's direct and indirect effect on the ecology of the land, air and water environment, established park and recreational areas, and on any sites of natural, historic and scenic values and resources of the area in which the facility is to be located, and any other relevant environmental effects. The Environmental Impact Statement shall set out: (i) the environmental impact of the proposed action; (ii) any

adverse environmental effects which cannot be avoided; (iii) a description of the comparative merits and detriments of each alternate location or for generating plants, the energy production process considered, and a statement of the reasons why the proposed location and production process were selected for the facility; (iv) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented; (10); such other information of an environmental or economic nature as the applicant may consider relevant or as the Commission may by regulation or order require; (11) promptly after filing, the staff of the Commission shall invite comments from all State agencies entitled to service under Subsection (b) of this Section as to the adequacy of applicant's statements. The invitation to comment shall advise said State agencies that comments must be received within sixty (60) days of the date of mailing or delivery thereof, unless an agency request [requests] for cause a longer period for consideration. Upon review of said comments, if any, if the staff shall determine that the applicant failed to include or adequately develop any environmental or economic aspect of the facility, it shall issue a deficiency letter pointing out in detail all such specific deficiencies in the statement(s). Such deficiency letter shall be prepared and served upon applicant as promptly as possible and in no event later than twenty (20) days before the date set for the public hearing. Applicant shall promptly respond to any deficiency letter and the public hearing shall be deferred unless applicant has responded prior thereto to any deficiency letter.

(b) Each application shall be accompanied by proof of service of a copy of such application on the Mayor of each municipality, the County Judge, the Chairman of the County Planning Board, if any, and on any head of a

government agency charged with the duty of protecting the environment or of planning land use upon which the Commission has by regulation or order directed service be made, in the area in which any portion of such facility is to be located, both as primarily and as alternatively proposed, on each member of the legislature in whose district the facility or any alternative location listed in the application is to be located, on the Office of the Governor, and upon the director or other administrative head of the following State agencies or departments: (1) Department of Pollution Control and Ecology; (2) Department of Health; (3) Department of Local Services; (4) Department of Industrial Development; (5) Department of Commerce; (6) Arkansas Highway Department; (7) Arkansas Game and Fish Commission; (8) Arkansas Environmental Preservation Commission; (9) Any State agency which may have authority to assist in financing the applicant's facility; (10) Any other State agency or department which manages or has jurisdiction over State owned lands on which all or part of the proposed utility facility is to be, or may be located; (11) Department of Finance and Administration; (12) State Energy Conservation and Policy Office; (13) Attorney General; (14) Any other State agency or department designated by Commission regulation or order. The copy of such application shall be accompanied by a notice specifying the date on or about which the application is to be filed, and a notice that interventions or limited appearances must be filed with the Commission within thirty (30) days after the date set forth as the date of filing, unless good cause is shown pursuant to Section 7(c) [§ 73-276.6 (c)] of this Act.

(c) Each application shall also be accompanied by proof that public notice thereof was given to persons residing in municipalities and counties entitled to receive

notice under Subsection (b) of this Section, by the publication of a summary of the application, and a statement of the date on or about which it is to be filed, and a statement that intervention or limited appearances must be filed with the Commission within thirty (30) days after the date set forth in said notice, unless good cause is shown pursuant to Section 7(c) [§ 73-276.6(c)] of this Act, in a newspaper or newspapers having substantial circulation in such municipality, municipalities, or county or counties. For purposes of this Subsection any environmental impact statement submitted as an exhibit to the application need not be summarized, but the published notice shall include a statement that said impact statements are on file at the office of the Commission and available for public inspection. The applicant shall also cause copies of the environmental impact statement to be furnished to at least one [1] of its local offices, if any, in the county or counties in which any portion of such facilities are to be located, both as primarily or as alternatively proposed, to be there available for public inspection. The published notice shall contain a statement of the location of these local offices and the times said impact statements will be available for public inspection.

(d) Inadvertent failure of service on, or notice to, any of the municipalities, counties, government agencies or persons identified in Subsections (b) and (c) of this Section may be cured pursuant to orders of the Commission designed to afford such persons adequate notice to enable their effective participation in the proceedings. In addition, the Commission may, after filing, require the applicant to serve notice of the application or copies thereof or both upon such other persons, and file proof thereof, as the Commission may deem appropriate.

(e) Where any personal service or notice is required herein, such service may be made by any officer authorized by law to serve process, by personal delivery or by certified mail.

(f) An application for an amendment of a certificate shall be in such form and contain such information as the Commission shall prescribe. Notice of such an application shall be given as set forth in Subsections (b) and (c) of this Section.

(g) An initial filing fee of Five Hundred Dollars ($500.00) shall accompany each application. [Acts 1973, No. 164, § 5, p. 564; 1977, No. 866, §5, p. 2160.]

73-276.5. Hearing on application or amendment. — (a) Upon receipt of an application complying with Section 5 [§ 73-276.4], the Commission shall promptly fix a date for the commencement of a public hearing thereon, not less than forty (40) nor more than ninety (90) days after such receipt, and shall conclude the proceeding as expeditiously as practicable. The testimony presented at such hearing may be presented in writing or orally, provided that the Commission may make rules designed to exclude repetitive, redundant or irrelevant testimony.

(b) On an application for an amendment of a certificate, the Commission shall hold a hearing in the same manner as a hearing is held on an application for a certificate if the Commission affirmatively finds from the application, within thirty (30) days from the date of filing, that the proposed change in the facility would result in any material increase in any environmental or economic impact of the facility, or that a substantial change will occur in the

location of all or a portion of such facility other than as provided in the alternates set forth in the original application. If the Commission does not make such a finding by order within thirty (30) days after filing of the application for amendment, said amendment shall become effective and the certificate shall be deemed to be amended as requested. Any party which files an application for an amendment of a certificate shall serve copies thereof on each party to the original proceedings. [Acts 1973, No. 164, § 6, p. 564, 1977, No. 866, § 6, p. 2160.]

73-276.6 Parties to certification proceedings. — (a) The parties to a certification proceeding shall include: (1) the applicant; (2) each municipality, county and government agency or department or other person entitled to receive service of a copy of the application under Subsection (b) of Section 5 [§ 73-276.4] of this Act, if it has filed with the Commission a notice of intervention as a party within thirty (30) days after said service; (3) any person residing in a municipality or county which is entitled to receive service of a copy of the application under Subsection (b) of Section 5 [§ 73-276.4] of this Act, or any domestic nonprofit corporation, formed in whole or in part to promote conservation or natural beauty, to promote energy conservation, to protect the environment, personal health or other biological values, to represent commercial and industrial groups, or to promote the orderly development of the areas in which the facility is to be located, where such person or organization has an interest which may be directly affected by the Commission's action and which interest is not adequately represented by other parties, if such a person or corporation has petitioned the Commission for leave to intervene as a party within thrity [thirty] (30) days after the date given in the public notice as the date of filing the application.

(b) Any person may make a limited appearance in the proceeding by filing a verified statement of position within thirty (30) days after the date given in the public notice as the date of filing the application. No person making a limited appearance shall be a party or shall have the right to receive further notice, or to cross-examine witnesses on any issue outside the scope of its statement of position, and such person making a limited appearance is subject to being called for cross-examination only on the subject matter of such statement of position by the applicant or other party. If such person fails to appear for cross-examination, if called, such statement of position may be stricken from the record at the discretion of the Commission.

(c) The Commission may, for good cause shown, grant a petition for leave to intervene as a party or to make a limited appearance and to participate in subsequent phases of the proceeding, filed by any person who failed to file a timely notice of intervention or petition for leave to intervene, as the case may be, whose interests the Commission finds are not otherwise adequately represented by another party, and whose participation will not delay the proceedings, if such intervention or limited appearance is filed and served at least ten (10) days in advance of the date the hearing on the application is scheduled to commence.

(d) Every notice of intervention and petition to intervene shall be in writing and shall comply with all procedural rules of the Commission, and shall contain clear and concise statements of the nature of the right or interest of the petitioner or intervenor in the proceeding, the specific objections of the petitioner or intervenor to the applicant's proposal, the grounds and issues of fact and law

upon which petitioner or intervenor wishes to be heard, and any other reasonable information which may be required by rule or order of the Commission. [Acts 1973, No. 164, § 7, p. 564; 1977, No. 866, § 7, p. 2160.]

73-276.7. Conduct of hearing. — A record shall be made of the hearing and of all testimony taken and the cross-examination thereon. Rules of evidence[,] as specified by the Commission, shall apply to the proceeding. The Commission may provide for the consolidation of the representation of parties having similar interests. [Acts 1973, No. 164, § 8, p. 564; 1977, No. 866, § 8, p. ____.]

73-276.8. Decision of commission. — (a) The Commission shall render a decision upon the record either granting or denying the application as filed, or granting it upon such terms, conditions or modifications of the location, financing, construction, operation or maintenance of the major utility facility as the Commission may deem appropriate. The Commission may not grant a certificate for the location, financing, construction, operation and maintenance of a major utility facility, either as proposed or as modified by the Commission, unless it shall find and determine (1) the basis of the need for the facility; (2) that the facility will serve the public interest, convenience and necessity; (3) the nature of the probable environmental impact of the facility; (4) that the facility represents an acceptable adverse environmental impact, considering the state of available technology, the requirements of the customers of the applicant for utility service, the nature and economics of the proposal and the various alternatives, if any, and other pertinent considerations; (5) the nature of the probable economic impact of the facility; (6) that the facility financing method either as proposed or as modified by the Commission represents an acceptable economic impact,

considering economic conditions and the need for and cost of additional public utility services; (7) in the case of an electric transmission line, that such facility is not inconsistent with known plans of other electric systems serving the State, which have been filed with the Commission; (8) in the case of a gas transmission line, that the location of the line will not pose an undue hazard to persons or property along the area to be traversed by the line; (9) (and) that the energy efficiency of the power production facility has been given significant weight in the decision-making process; and (10) that the location of the facility as proposed conforms as closely as practicable to applicable State, regional and local laws and regulations issued thereunder, except that the Commission may refuse to apply all or any part of any regional or local law or regulation if it finds that, as applied to the proposed facility, such law or regulation is unreasonably restrictive in view of the existing technology, or of factors of cost or economics, or of the needs of consumers whether located inside or outside of the directly affected government subdivisions.

(b) If the Commission determines that the location or design of all or a part of the proposed facility should be modified, it may condition its certificate upon such modification, provided that the municipalities, counties and persons residing therein affected by the modification shall have been given reasonable notice thereof, if such persons, municipalities or counties have not previously been served with notice of the application. If the Commission requires, in the case of a transmission line, that a portion thereof shall be located underground in one or more areas, the Commission shall, after giving appropriate notice and an opportunity to be heard to affected ratepayers, have the power and authority to authorize the adjustment of rates and charges to customers within the area or areas where

the underground portion of the transmission line is located in order to compensate for the additional costs, if any, of such underground construction.

(c) If the Commission determines that financing of all or part of the proposed facility should be modified, it may condition its certificate upon such modification. If at the time of filing of the application or within 60 days thereafter the federal income tax laws and the State laws would permit the issuance of tax-exempt bonds to finance the construction of the proposed facility for the applicant and if the Commission determines that financing the facility with such tax-exempt bonds would be in the best interests of the people of the State, the Commission shall, after giving appropriate notice and an opportunity to be heard to the parties, have the power and authority to require by order or regulation that the facility be financed in such manner as may be provided elsewhere by law.

(d) A copy of the decision and any order issued therewith shall be served upon each party within sixty (60) days after the conclusion of each hearing held under this Act [§§ 73-276 – 73-276.18].

(e) Any certificate issued hereunder to an applicant shall be in lieu of, and exempt the applicant from, the requirements of obtaining a certificate of convenience and necessity pursuant to Sections 41, 42 or 43 of Act 324 of 1935 [§§ 73-240 – 73-242], as amended, and shall also entitle such applicant to a permit under Act 188 of 1961 [§§ 73-2201 – 73-2216] without any further notice or hearing, provided said applicant shall have filed with the Commission the consent or authorization required by Subsection (7) of Section (3) [§ 73-2203] of said Act, and paid the damages set out in said Act. [Acts 1973, No. 164, § 9, p. 564; 1977, No. 866, § 9, p. 2160.]

73-276.9 Findings of fact required. — In rendering a decision on the application for a certificate, the Commission shall issue and serve upon all parties an order which shall include or be accompanied by, findings of fact stating its reasons for the action taken. If the Commission has found that any regional or local law or regulation, which would be otherwise applicable, is unreasonably restrictive pursuant to Paragraph (10) of Subsection (a) of Section 9 [§ 73-276.8(a) (10)] of this Act, it shall state in its order the reasons therefor. [Acts 1973, No. 164, § 10, p. 564; 1977, No. 866, § 10, p. 2160.]

73-276.10 Rehearing — Judicial review. — Any party aggrieved by any decision issued on an application for a certificate may apply for a rehearing as provided in Act 231 of 1973 [§§ 73-229 – 73-229.3] as amended. Any party aggrieved by the final decision of the Commission on rehearing may obtain judicial review thereof in accordance with the provisions of Act 231 of 1973 [§§ 73-229 – 73-229.3], as amended. [Acts. 1973, No. 164, § 11, p. 564; 1977, No. 866, § 11, p. 2160.]

73-276.11 Jurisdiction of courts. — Except as expressly set forth in Section 11 [§ 73-276.10] and Section 19 [§ 73-276.18] of this Act, no court of this State shall have jurisdiction to hear or determine any issue, case or controversy concerning any matter which was or could have been determined in a proceeding before the Commission under this Act [§§ 73-276 – 73-276.18] or to stop or delay the financing, construction, operation or maintenance of a major utility facility except to enforce compliance with this Act or the provisions of a certificate issued hereunder. [Acts 1973, No. 164, § 12, p. 564; 1977, No. 866, § 12, p. 2160.]

73-276.12. Powers of local governments and state agencies. — Notwithstanding any other provision of law, no

State department or agency, except the Department of Pollution Control and Ecology as set out in Section 19 [§ 73-276.18] of this Act, or municipality or other local government unit may require any approval, consent, permit, certificate or other condition for the construction, operation or maintenance of a major utility facility authorized by a certificate issued pursuant to the provisions of this Act [§§ 73-276 — 73-276.18]; except that nothing herein shall prevent the application of State laws for the protection of employees engaged in the construction, operation or maintenance of such facility. [Acts. 1973, No. 164, § 13, p. 564; 1977, No. 866, § 13, p. 2160.]

73-276.13. **Joint hearings and orders.** — The Com-Commission in the discharge of its duties under this Act [§§ 73-276 — 73-276.18] or any other Act, is authorized to make joint investigations, hold joint hearings within or without the State, and issue joint or concurrent orders in conjunction or concurrence with any official or agency of any other State or of the United States, whether in the holding of such investigations or hearings, or in the making of such orders, the Commission shall function under agreements or compacts between States or under the concurrent power of States to regulate interstate commerce, or as an agency of the United States, or otherwise. The Commission, in the discharge of its duties under this Act, is further authorized to negotiate and enter into agreements or compacts with agencies of other States, pursuant to any consent of Congress, for cooperative efforts in certification, construction, financing, operation and maintenance of major utility facilities in accord with the purposes of this Act and for the enforcement of the respective State laws regarding same. The Arkansas Public Service Commission is hereby deemed to be the agency of the State of Arkansas that shall be the member of any regional hearing authority or

Commission created by the terms of any compact between Arkansas and other States or between Arkansas and the United States of America otherwise concerning the implementation of this Act, except as may be provided by Section 19 [§ 73-276.18] herein. It is the intent of the Legislature to confer upon the Commission under this Act broad rule making authority adequate to enable it to comply with any requirements, imposed by State or federal legislation dealing with the subject matter of this Act, upon state administered certification programs; and to enable it to comply with any State or federal requirements for facilitating the issuance of tax-exempt bonds, should such issuance be authorized. [Acts 1973, No. 164, § 14, p. 564; 1977, No. 866, § 14, p. ____.]

73-276.14. Forecasts of loading and resources. — Each public utility shall annually furnish a report to the Commission for its review containing a forecast of loads and resources and describing the major utility facilities which, in the judgment of such utility, will be required to supply system demands during the forecast period. The forecast shall cover a period of at least two (2) calendar years, next succeeding the date of such report, and such additional longer range forecast reports as the Commission may find necessary and may require by rule or regulation from time to time. All such reports shall be available to public inspection, and a copy of any report shall be furnished by the Commission to any municipality, county, or government agency charged with the duty of protecting the environment or of planning land use which requests a copy of such a report in writing. The report shall be in such form and shall contain such information as may be reasonably prescribed by the Commission by rule or regulation. The Commission, pursuant to this section, may also require each

public utility to furnish, from time to time, reports concerning actions taken by the utility to encourage the conservation of energy by its customers. [Acts 1973, No. 164, § 15, p. 564; 1977, No. 866, § 15, p. 2160.]

73-276.15. **Eminent domain.** — (a) Whenever a certificate has been issued to an applicant for the construction of any major utility facility under the provisions of this Act [§§ 73-276 – 73-276.18] and such applicant is unable to reach agreement with the owner of land (hereafter in this section the word "land" shall include any estate or interest therein) to construct, operate, maintain and obtain reasonable access to the major utility facility in accordance with the certificate, it may acquire the same by the exercise of a power of eminent domain in a State court of competent jurisdiction in the judicial district in which such land is located. In the event the property sought to be condemned is owned by one [1] person and is situated in more than one [1] county, the petition may be filed in the court of any county where a part of the property may be located. The petition shall contain or have annexed thereto: (1) a statement of the authority under which and the use for which such land is taken; (2) a description of the land taken sufficient for the identification thereof; (3) a statement of the estate or interest in the land taken for such use; (4) a statement that a certificate has been issued to petitioner; (5) a statement of the sum of money estimated by such utility to be just compensation for the land taken.

(b) After the filing of such petition and upon the deposit in court of a sum determined by the Court to be sufficient to secure compensation to the owner or owners of the property or interest therein sought to be condemned, the Court shall immediately enter an order finding title to such land in fee simple absolute, or such less estate or

interest therein as is prayed in such petition, to be vested in such applicant, and such land, or interest therein, shall be deemed to be condemned and taken for the use of the applicant, and the right to just compensation for the same fee or for such lesser interest as may be taken shall vest in the person or persons entitled thereto; provided, however, that any taking of lands in fee simple absolute under the authority granted herein shall be limited to taking for electric generating plant sites and substation sites, and compressor station sites, and meter station sites only, and nothing herein shall be construed as authorizing a utility to take fee simple title to lands for gas or electric transmission line or distribution line rights-of-way purposes.

(c) Such compensation shall be determined by a jury pursuant to Section 35-310 Ark. Statutes 1947 Annotated.

(d) Upon the filing of a petition, the court shall have power to fix the time within which and the terms upon which the party or parties in possession shall be required to surrender possession to such applicant. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance and other charges, if any, as shall be just and equitable.

(e) No appeal in such proceeding or any bond or undertaking given therein shall operate to prevent or delay the vesting of title to such land in such applicant.

(f) The right to exercise the power of eminent domain and to take possession and title in advance of final judgment in such proceeding and all powers delegated in this Section shall be in addition to any right, power or authority conferred by any other laws of the State of

franchises, contracts, or agreements and shall not be construed as abrogating, limiting or modifying any such right, power, authority, franchise, contract or agreement. [Acts 1973, No. 164, § 16, p. 564; 1977, No. 866, § 16, p. 2160.]

73-276.16. Cooperation of state agencies—Employees of commission. — All State agencies and departments entitled to service under Section 5(b) [§ 73-276.4(b)] are directed to cooperate with and render assistance to the Commission in discharging its responsibilities under this Act [§§ 73-276 – 73-276.18]. The Commission is empowered to employ additional consultants to assist it as it deems necessary to an adequate appraisal of the application. [Acts 1973, No. 164, § 17, p. 564; 1977, No. 866, § 17, p. 2160.]

73-276.17. Limitation on commission's power. — Nothing in this Act [§§ 73-276 – 73-276.18] shall be deemed to confer upon the Commission power or jurisdiction to regulate or supervise the rates, service or securities of any person not otherwise subject to the Commission's jurisdiction. [Acts 1973, No. 164, § 18, p. 564; 1977, No. 866, § 18, p. 2160.]

73-276.18. Effect on department of pollution control and ecology. — Nothing herein contained shall affect the jurisdiction of the Department of Pollution Control and Ecology with respect to water and/or air pollution control or other matters within its jurisdiction or the requirement that a person apply for and obtain a permit from said Department as provided by the Arkansas Water and Air Pollution Control Act [§§ 82-1901 – 82-1909, 82-1931 – 82-1943], as amended (Ark. Stats. Ann. Section 84-1901 et seq.); nor shall anything herein contained confer upon the Public Service Commission any authority or jurisdiction conferred by law upon the Department of Pollution Control and Ecology or be deemed to amend said Arkansas Water and Air Pollution Control Act. [Acts 1973, No. 164, § 19, p. 564; 1977, No. 866, § 19, p. ____.]

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ALEXANDER L. STEV
CLERK

NO. 80-1486

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

OMNI FARMS, INC.,

Appellant,

VS.

ARKANSAS POWER & LIGHT COMPANY,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF ARKANSAS

MOTION IN THE ALTERNATIVE TO DISMISS OR TO AFFIRM

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May it please the Court:

Appellee moves that the appeal herein taken be dismissed on the grounds that said appeal does not present a substantial federal question, that the Order of Taking appealed by Appellant is not a final judgment reviewable either by appeal or certiorari, and that Appellant has not drawn in question the validity of a state statute as being repugnant to the United States Constitution.

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OPINION BELOW

This is an appeal from a decision of the Supreme Court of Arkansas rejecting Appellant's contentions that Appellee failed to negotiate in good faith before instituting condemnation proceedings and that Appellant was denied due process of law in violation of the Fourteenth Amendment to the Constitution of the United States because it was not furnished proper notice of the impending condemnation.

JURISDICTION

Appellant purports to appeal pursuant to 28 U.S.C. §1257(2). Alternatively, Appellant seeks review by writ of certiorari under 28 U.S.C. §2103. For the reasons developed in the Argument portion of this Motion, appeal is not the proper avenue for review and certiorari should not be granted.

STATEMENT OF THE CASE

Act 164 of the 1973 Arkansas General Assembly as amended by Act 866 of 1977 of the same state legislature (the Act) is titled the "Utility Facility Environmental and Economic Protection Act." The Act (Ark. Stat. §§73-276 — 73-276.18) is printed in its entirety at pages 28-49 of the Appendix to Appellant's Jurisdictional Statement. Among other things the Act prescribes the procedures to be followed by a public utility before The Arkansas Public Service Commission (the Commission) and the substantive prerequisites for obtaining from the Commission a Certificate of Environmental Compatibility and Public Need (Certificate) to construct a "major utility facility" as defined by the Act. Electric transmission lines are included in the definition of "major utility facilities." Section 16 of the Act (Ark. Stat. §73-276.15) provides the substantive and procedural framework for a public utility such as Appellee to exercise the power of eminent domain when necessary to acquire an interest in land upon which to erect approved major utility facilities.

Appellant (OMNI) is an Arkansas corporation and the owner of a 1,500 acre farm in Lonoke County, Arkansas. Appellee (AP&L) is an Arkansas corporation and a wholly owned subsidiary of Middle South Utilities, Inc. Its principal business is the production and sale of electricity.

On December 14, 1977, Appellee filed an Application with the Commission seeking a Certificate to construct, maintain, and operate electric transmission lines and associated substation facilities as defined by the Act. An Environmental Impact Statement (EIS) accompanied the filing.

On February 3, 1978, the Commission entered an Order scheduling a hearing on Appellee's Application on procedural matters only for March 14, 1978. The Application was assigned Commission Docket No. U-2904. This Order directed that testimony would be heard at a future date, that landowners whose property would be crossed by the proposed transmission line should be notified of the date testimony would be heard, and that Appellee should serve a copy of the Order on all of these same landowners.

On or about February 13, 1978, Appellee mailed a letter bearing that date to Appellant and all other landowners along the transmission line route by ordinary mail enclosing a copy of the Commission's February 3, 1978 Order. Additionally, this letter notified Appellant of Appellee's Application to construct a 500,000 volt electric transmission line across Appellant's land on a preferred route, enclosed photographs showing typical structures that may be used in construction of the transmission line, notified Appellant of the time and place of the March 14, 1978, procedural hearing, advised Appellant that the Commission would later schedule a hearing concerning the Application and the proposed transmission line route, invited Appellant to seek information from Appellee by telephone or letter as to its right to intervene or make a limited appearance in the proceeding before the Commission, and promised to notify Appellant of the time and place of the future hearing upon receiving advice of same from the Commission. The name, address, and telephone number of Appellee's Manager of Land and Right-of-Way was also included, and Appellant was invited to address all inquiries to him. Appellant admits receiving this first letter and enclosures.

On December 27, 1978, Appellee filed an Amended and

Substituted Application for a Certificate to construct the same facilities.

On or about January 16, 1979, Appellee mailed another letter to Appellant and all other landowners along the transmission line route imparting the same type of information as the earlier letter. In addition, a map was enclosed showing the approximate location of a Preferred Route and an Alternate Route. Appellant was advised that both routes crossed its lands. Appellant admits receiving this second letter and enclosures.

On February 5, 1979, the Commission entered an Order setting Appellee's Application for a hearing on its merits for March 27, 1979, in the Commission's Hearing Room.

On or about February 14, 1979, Appellee mailed another letter to Appellant and all other landowners along the transmission line route enclosing a copy of the Commission's February 5, 1979, Order and inviting them to attend the March 27, 1979, hearing. This letter again offered information on intervening or making a limited appearance, and the name, address, and toll-free telephone number of Appellee's Manager of Land and Right-of-Way was again provided. Appellant denies receiving this third letter and enclosures.

On July 30, 1979, the Commission entered an Opinion and Order in Docket No. U-2904 granting Appellee's Application for a Certificate. The project approved by the Certificate was estimated by Appellee to cost $81,970,000 to construct. It consisted of two separate 500,000 volt transmission lines 86.67 miles in length and 82.94 miles in length, respectively, and related substation facilities. Only one of these transmission lines would cross Appellant's

farm just as each letter had stated. Appellant took no part in the March 27, 1979, proceedings before the Commission.

On or about September 12, 1979, Appellee again wrote Appellant and all other landowners along the transmission line route advising that Appellee's land surveyors would soon be on their lands for the purpose of staking the transmission line easement. Landowner cooperation was solicited. Appellant admits receiving this fourth letter.

On or about February 11, 1980, Appellee's survey crew arrived at Appellant's farm to begin surveying the transmission line easement across Appellant's farm. Permission to survey was denied initially by Appellant, but four days later Appellant did give Appellee's survey crew permission to enter the farm and survey the easement, which is 180 feet wide and 4,210 feet in length containing 17.4 acres, more or less. At that time Appellee first learned from its surveyors that Appellant had just begun construction of a dirt landing strip running in a perpendicular direction across Appellee's proposed transmission line easement.

On March 5, 1980, Appellant filed a Petition with the Commission requesting that Docket No. U-2904 be reopened for the purpose of hearing evidence concerning the final route of the transmission line that was to cross Appellant's farm per the Commission's Order of July 30, 1979. The Commission denied the Petition on April 4, 1980. Appellant has not appealed from that Order.

After attempting to negotiate the purchase of the easement, Appellee filed a Complaint in the Circuit Court of Lonoke County, Arkansas, on March 10, 1980, against Appellant seeking to condemn the easement across Appellant's farm for the electric transmission line. A hearing was

conducted on April 7, 1980, and Appellee was awarded an Order of Entry on May 2, 1980, upon depositing $15,000 into the registry of the court. That Order of Entry was subsequently stayed on May 5, 1980, except that Appellee was given the right to survey and stake its easement.

Despite the Stay Order of the Lonoke Circuit Court still in effect, Appellant filed a separate suit against Appellee in the Chancery Court of Pulaski County, Arkansas, on July 15, 1980, seeking the identical injunctive relief requested in its Application for Writ of Injunction filed with this Court. That action is still pending, and Appellant has not requested a hearing on the merits. The style of that case is *Omni Farms, Inc. v. Arkansas Power & Light Company,* Pulaski Chancery 80-3244, First Division.

Appellant appealed from the Order of Entry to the Arkansas Supreme Court on April 28, 1980, and, among other things, challenged the statutory eminent domain procedures followed by Appellee as "violating Appellant's due process rights."

Specifically, Appellant has urged that, although Appellee notified Appellant by letter on two occasions that Appellee had made application to the Commission for a certificate to build and locate its facilities across Appellee's farm, Appellant did not receive a third letter mailed by Appellee notifying Appellant of the exact date of the hearing on Appellee's application before the Commission. This, Appellant contends denied it due process of law.

The Arkansas Supreme Court affirmed the trial court Order of Entry in favor of Appellee, finding that Appellant had been accorded due process of law. Appellant filed a Petition For Rehearing with the Supreme Court of Arkan-

sas on November 21, 1980. By Per Curiam Order dated December 8, 1980, the Petition for Rehearing was denied.

There still has been no trial on the merits on the issue of the amount of just compensation owing to Appellant by Appellee for the easement condemned.

Appellant is now attempting to appeal from the decision of the Arkansas Supreme Court styled *Omni Farms, Inc. v. Arkansas Power & Light Company*, 271 Ark. 61, 607 SW2d 363 (1980). The text of that decision is printed at pages 10-17 of the Appendix to Appellant's Jurisdictional Statement. Appellant filed its Notice of Appeal with this Court on December 31, 1980.

On February 27, 1981, and March 2, 1981, respectively, Appellee received copies of Appellant's Application for Writ of Injunction and Jurisdictional Statement filed in this proceeding. This is a response to the Jurisdictional Statement.

Appellant's Jurisdictional Statement purports to pose two questions presented on appeal to this Court:

I. Whether the Appellee in good faith negotiated as required by the Arkansas Eminent Domain Statute.

II. Whether the Appellant's due process rights were violated by Appellee's failure to give personal notice of the administrative hearing on the major utility route affecting its real property, as allowed by Arkansas statute.

ARGUMENT

I.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A. WHETHER APPELLEE NEGOTIATED IN GOOD FAITH WITH APPELLANT TO PURCHASE THE EASEMENT AND TO WHAT EXTENT ARKANSAS EMINENT DOMAIN STATUTES REQUIRE SUCH NEGOTIATION DO NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The total absence of a substantial federal question from Appellant's first question presented on appeal dealing with good faith negotiation is self-evident. In fact, Appellant in phrasing the question, complains of a violation of a state statute! No federal constitutional issue or right is even remotely identified. Moreover, Appellant simply poses the naked question without further discussion or citation of authority. No reference is made to the "good faith negotiation question" in the portion of Appellant's Jurisdictional Statement found at pages 4-7 styled Statement of Substantial Questions. In short, this ground for appeal is both fictitious and frivolous.

Moore's Federal Practice §512.01 analyzes the substantial federal question requirement for appellate review by this Court stating that the guidelines for refusing jurisdiction on that basis are general. This Court refuses to review a case in which the federal question is frivolous, *Equitable Life Assurance Society v. Brown,* 187 U.S. 308 (1902). Surely it is even more frivolous when the question presented is not even a federal one!

Moore cites *Milheim v. Moffat Tunnel Improvement District,* 262 U.S. 710 (1923) for the proposition that:

> . . . The Court will dismiss an appeal from, or a writ of certiorari as improvidently granted to, a state court 'if the questions on which the decision depends are found to be so wanting in substance as not to need further argument.'

Moore then summarizes the substantial federal question requirement as follows:

> In accordance with these principles of substantiality the Supreme Court will refuse to review state court judgments where the federal question is 'utterly without foundation;' no substantial federal question is raised in light of prior Supreme Court decisions; the only question of law left open involves state practice; the state court decision can be interpreted as construing a local contract under local law thereby avoiding a constitutional question; where it is clear that state statutes and state court rules do not go beyond the range of state action allowed by the Fourteenth Amendment and in related situations.

Appellant's first question presented flunks the tests for substantiality enumerated by *Moore*. Probably the rule announced in *Seaboard Air Line Ry. Co. v. Watson,* 287 U.S. 86 (1932) that this Court will refuse to review state court judgments where the federal question is "utterly without foundation" is most appropriate when considering Appellant's first question presented.

B. APPELLANT'S ALLEGED FAILURE TO RECEIVE PERSONAL NOTICE OF AN ADMINISTRATIVE HEARING DETERMINING THE NECESSITY FOR AND LOCATION OF AN ELECTRIC TRANSMISSION LINE EASEMENT ACROSS APPELLANT'S LAND DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Much of what has been said about Appellant's first question presented pertaining to good faith negotiation has relevance to its second question presented pertaining to notice. Neither question presents a substantial federal issue. This Court has already spoken on several occasions to the second question pertaining to notice raised by Appellant, and it has consistently answered that question adversely to Appellant's position. Accordingly, this Court should refuse to review a state court judgment where no new substantial federal question is raised in light of prior United States Supreme Court decisions. *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390 (1952).

Not only has Appellant failed to raise a substantial federal question to justify review by appeal, Appellant has failed to cite special and important reasons to justify review by writ of certiorari. United States Supreme Court Rule 17.1 requires that such special and important reasons be expressed.

This Court has already decided the issue of Appellant's right to a hearing on the *legislative* or *administrative* questions of Appellee's need for the easement and the location of the easement. It has been the holding of this Court since at least 1919 that Appellant is *not* entitled to a hearing on these issues. Accordingly, it follows that notice of such a

hearing is not required either. *Bragg v. Weaver,* 251 U.S. 57 (1919). All that is essential to due process of law is that a landowner be afforded a trial on the issue of the amount of just compensation for the land condemned and reasonable notice of that trial.

Actually, the nature of the power of eminent domain is even more basic and fundamental than the constitutional provision of due process of law. The power of eminent domain does not actually originate in a legislative or constitutional grant of authority but is an inherent attribute of the sovereignty of the State itself. The procedure for exercising the power is a matter of regulation by the state legislature. *Rindge Co. v. Los Angeles County,* 262 U.S. 700 (1923); *Bragg v. Weaver, supra*; *Joiner v. City of Dallas,* 380 F. Supp. 754 (N.D. Tex. 1974), affirmed 419 U.S. 1042, rehearing denied, 419 U.S. 1132 (1975).

One of the more recent discussions on the subject of the application of procedural due process to the law of eminent domain is found in *Joiner v. City of Dallas, supra.* At 380 F. Supp. 771, the United States District Court stated:

> The power of eminent domain, whether exercised by the state legislature or a municipal corporation, is a unique sovereign right fundamental to the performance of governmental responsibilities. This power is essentially and fundamentally legislative, and its character cannot be changed by switching the labels under which it is pursued. As stated by the Supreme Court in a challenge to the condemnation of property for a seacoast highway: 'And so construed this statute is not in conflict with the Fourteenth Amendment, either because it fails to provide for a hearing by the landowners before

> such resolution is adopted, or otherwise. The necessity for appropriating private property for public use is not a judicial question. This power resides in the legislature, and may either be exercised by the legislature or delegated by it to public officers. Where the intended use is public, the necessity and expediency of taking may be determined by such agency and in such mode as the State may designate. They are legislative questions, no matter who may be charged with their decision . . .' *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 709 (1923).

Joiner v. City of Dallas, supra, further addresses the question of procedural due process in eminent domain proceedings at page 764:

> That the power of eminent domain must be exercised in accordance with due process of law is an explicit requirement under the Fourteenth Amendment. The perimeters of the Due Process requirement in eminent domain proceedings have been sharply defined through a series of Supreme Court decisions, however, and the customary 'due process' attack has limited chance of success. For example, the Court has repeatedly characterized the condemnor's decision on the necessity for a taking and the quantity to be appropriated as legislative and has, therefore, denied to landowners the right to participate in that decision-making process or to litigate on federal constitutional grounds the decision to condemn private property. (Numerous citations omitted).

Coincidentally, the Commission in its Opinion and

Order entered in Docket No. U-2904 addressed a similar issue of notice now raised by Appellant. At pages 21 and 22 of its Opinion and Order in a concurrence by Chairman Norton, the Commission discussed the issue of notice of the hearing before it in the following words:

> I do not believe these concerns reflect a legal technician's overemphasis on procedure. Grave issues are involved here, as are important interests which deserve close protection. Article II, Section 22 of our Constitution states:
>
> > The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor.
>
> Despite the precedence and height of the right of property, however, the law of eminent domain does not permit a property owner to question the necessity of depriving him of his property. *Sloan v. Lawrence County,* 134 Ark. 121, 203 SW 260 (1918). Nor does the Fourteenth Amendment to the United States Constitution require an opportunity to be heard as to the necessity of the taking. *North Laramie Land Company v. Hoffman,* 268 U.S. 276 (1925).
>
> This condition of the law results from the judicial determination that questions of the necessity or expediency of a taking are not issues for courts to resolve.
>
> They are legislative questions, no matter who

> may be charged with their decision, and a hearing thereon is not essential to due process.
>
> *Mississippi and R. River Boom Company v. Patterson,* 98 U.S. 403, 406 (1879).

Apparently for the first time since this litigation began, Appellant in its Jurisdictional Statement attempts to discredit Ark. Stat. §§73-276 — 73-276.18 because they do not require personal notice to Appellant and other similarly situated landowners of the *legislative* hearing on Appellee's Application for a Certificate conducted by the Commission. Only notice by publication in a newspaper is required by the statutory scheme with respect to landowners whose lands may be ultimately affected by the hearing. Appellant and other similarly situated landowners still had an opportunity to sell an easement to Appellee or litigate with Appellee in a subsequent eminent domain suit of which they would receive personal notice.

The distinction between the *legislative* function of the Commission, which is an administrative agency of state government, to determine the need for and location of a transmission line easement, and the *judicial* function of the courts to ascertain just compensation to the landowner for the land condemned is obvious. Appellant is no more entitled by right or due process of law to personal notice of the legislative hearing of the Commission than it is to receive personal notice of the commencement of the biannual session of the Arkansas General Assembly. Accordingly, the Appellant's reliance on *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950) is misplaced. *Mullane* deals with the due process requirement of personal notice of a probate proceeding, a *judicial* hearing, under the circumstances of the address of a trust beneficiary being

known, and why notice by publication is constitutionally defective under that circumstance. Interestingly, *Mullane* held that notice by mail would be sufficient as opposed to notice by service of process. Appellant admitted receiving three out of the four notices mailed by Appellee.

Appellant also claims reliance upon *Boddie v. Connecticut*, 401 U.S. 371 (1971). *Boddie* held that the State of Connecticut denied due process of law to indigent persons by refusing to permit them to bring divorce actions except on payment of court fees and service-of-process costs which they were not able to pay. To Appellee's knowledge, Appellant is seeking neither a divorce nor claiming indigency. Since notice was not an issue in *Boddie* either, Appellee confesses that Appellant's reliance on *Boddie* is a mystery beyond Appellee's understanding. Perhaps the solution is that *Boddie* is no more in point than the questions raised by this appeal are substantial federal ones in nature.

II.

THE ORDER OF TAKING APPEALED BY OMNI IS NOT A FINAL JUDGMENT REVIEWABLE BY APPEAL OR BY CERTIORARI AS REQUIRED BY 28 U.S.C. §1257 (2) AND (3).

Since the Judiciary Act of 1789, it has been a prerequisite for the review of a state judgment by this Court that such judgment be a *final judgment* rendered by the highest court of the state. This Court lacks jurisdiction to hear Appellant's appeal or petition for writ of certiorari because 28 U.S.C. §1257 provides for review by this Court of *final judgments or decrees* rendered by the highest court of a state. The Order of Entry of the Lonoke County, Arkan-

sas Circuit Court in this eminent domain proceeding is *not* a final judgment or decree. It was entered prior to a trial on the merits on the issue of the amount of just compensation owing by the condemnor Appellee to the condemnee Appellant. That trial still has not occurred.

This Court determines what constitutes a final judgment or decree because this issue becomes a federal matter. What might be a final judgment from the standpoint of a state court is not necessarily a final judgment in the federal context. This is especially true of an eminent domain case where the ultimate issue of the amount of just compensation to the landowner has not been determined. *Grays Harbor Logging Co. v. Coats-Fordney Logging Company,* 243 U.S. 251 (1917) and *Catlin v. United States,* 324 U.S. 229 (1945).

In *Catlin, supra,* at pages 233-234 it was held that the rule that an order determining the right to take in a condemnation proceeding in advance of determination of just compensation lacks finality

> . . . applies to review by this Court of judgments of state courts, in advance of determination of just compensation, although by local statute 'judgments of condemnation,' i.e., of the right to condemn particular property, are reviewable before compensation is found and awarded . . . The foundation of this policy is not in merely technical conceptions of 'finality.' It is one against piece-meal litigation . . . Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals.

This Court has not waivered from the position just

stated. In fact, as recently as 1975 this Court established four categories of cases in which it has considered a state court's decision on federal issues to be final and has taken appellate jurisdiction although further proceedings were anticipated in the lower courts. Condemnation proceedings just like the case *sub judice* were specifically excluded from those four categories. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975).

III.

APPELLANT HAS NOT DRAWN IN QUESTION THE VALIDITY OF A STATE STATUTE AS BEING REPUGNANT TO THE UNITED STATES CONSTITUTION.

Appellant has not "drawn in question" the validity of a state statute on the ground of its being repugnant to the United States Constitution. At least Appellant failed to do so before the Arkansas Supreme Court. Such is required before this Court acquires jurisdiction to review this case on appeal. 28 U.S.C. §1257(2). Such is also required for review on writ of certiorari under one clause of 28 U.S.C. §1257(3). Appellant must pin its hope for review by this Court by writ of certiorari on the clause in 28 U.S.C. 1257 (3) that reads:

> . . . or where any title, right, privilege or immunity is specially set up or claimed under the constitution . . .

The Lonoke County Circuit Court in its Order of Entry dated May 1, 1980 did state:

> . . . The applicable laws, statutes and regulations

> which establish the guidelines and procedures by which . . . a private utility may acquire private property by eminent domain action, establish the necessity therefor, and prescribe the procedures for such action are . . . constitutional and not in deprivation of the due process rights of [Appellant]. (Pages 18-21 of Appendix to Jurisdictional Statement).

However, on appeal to the Arkansas Supreme Court the Appellant simply argued that its due process rights had been violated — not that the applicable Arkansas eminent domain statute was unconstitutional because it did not afford Appellant due process of law by way of failing to require reasonable notice of a *legislative* hearing before the Commission. As stated by the Arkansas Supreme Court in the opinion of *Omni Farms, Inc. v. Arkansas Power & Light Company* printed at pages 10-17 of the Appendix to Appellant's Jurisdictional Statement:

> Omni's alternative ground for dismissal is its assertion that the governing statute denies due process of law. The statute is Act 164 of 1973, amended by Act 866 of 1977. Ark. Stat. Ann. §§73-276.1 through 276.18. Omni's argument is really directed not so much to the terms of the statute as to Omni's failure to receive sufficient notice of the Public Service Commission proceeding by which AP&L was authorized to cross Omni's land. (p. 14)
>
> Omni's due process argument boils down to this. It complains that AP&L failed to give it the promised notice of a commission hearing, the nature of which Omni has not shown. Omni did receive ac-

> tual notice, once in February, 1978, and again in January, 1979, that the line was to cross its ranch. Details and sources of information were supplied, but Omni and Wright apparently paid little if any attention to the matter until receiving notice that AP&L's surveyors would be on the ground soon after September, 1979, more than 18 months after the February letter. We still do not know exactly what Omni's objections to the proposed line may be, because the record is practically silent on that pivotal point. We cannot say that Omni has proved a denial of due process of law by any lack of notice of the impending condemnation. (p. 17)

As indicated from the excerpts from the Arkansas Supreme Court decision quoted above, Appellant had not "drawn in question" the validity of the applicable Arkansas eminent domain statutes before that Court. It was not until Appellant filed its Jurisdictional Statement with this Court that Appellant raised for the first time on appeal the constitutionality of the Arkansas eminent domain statutes. That is fatal to this appeal. In *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969) this Court made the following statement:

> . . . [T]he fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions . . .

As further evidence of Appellant's failure to draw in question the validity of the Ark. Stat. §§73-276 — 73-276.18

before the Arkansas courts, Appellant did not certify to the Attorney General of Arkansas that a constitutional challenge had been made until it filed its Jurisdictional Statement in this Court. Appellant finally made such certification pursuant to 28 U.S.C. §2403(b) which provides:

> (b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Appellant apparently ignored Ark. Stat. §34-2510. It requires notice to the Arkansas Attorney General when the constitutionality of a state statute is questioned in a state court proceeding. That statute provides:

> When the declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a munici-

> pal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General of the State shall also be served with a copy of the proceeding and be entitled to be heard.

It is indeed ironic that Appellant complains of lack of notice in the context of notice allegedly guaranteed by the Fourteenth Amendment of the United States Constitution while at the same time Appellant waited until filing its Jurisdictional Statement before giving notice to the Arkansas Attorney General of its alleged challenge to the constitutionality of a state statute. Appellant should have given that notice while this case was still pending before the Circuit Court of Lonoke County, Arkansas.

In addition, since the Arkansas courts specifically made a finding of fact that Appellant had adequate notice of the Commission hearing, Appellant cannot even be heard on writ of certiorari about any "title, right, privilege or immunity claimed under the constitution" under 28 U.S.C. §1257(3). That finding of fact is not reviewable.

IV.

CONCLUSION

Appellant has brought an unwarranted appeal, and it should be dismissed for lack of the jurisdictional requirements discussed hereinabove, with all costs being assessed against Appellant.

IT IS SO MOVED.

Respectfully submitted,

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*Counsel of Record

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of this Court and Attorney of Record in this matter, certifies that the appropriate number of copies of the foregoing Motion in the Alternative to Dismiss or Affirm has been furnished to counsel for Appellant and others shown below by placing same in the U. S. Mail, postage prepaid, properly addressed on this 30th day of March 1981: John B. Thurman, Thurman & Capps, Ltd., No. 2504 McCain Place - Suite 201, North Little Rock, Arkansas 72116; The Honorable Cecil A. Tedder, Circuit Judge, Wilbur D. Mills Courts Bldg., Searcy, Arkansas 72143; Dona Williams, Arkansas Supreme Court Clerk, Justice Building, Little Rock, Arkansas 72201, and The Honorable Steve Clark, Arkansas Attorney General, Justice Building, Little Rock, Arkansas 72201.

/s/ Robert L. Robinson, Jr.

NO. 80-1486

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1980 TERM

OMNI FARMS, INC. ..... *Appellant*

vs.

ARKANSAS POWER & LIGHT ..... *Appellee*

ENTRY OF APPEARANCE

I, Robert L. Robinson, Jr. of House, Holmes & Jewell, P.A., law firm, hereby enter my appearance as counsel of record for the Appellee, Arkansas Power & Light Company.

Respectfully submitted,

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By: /s/ ROBERT L. ROBINSON, JR.